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GOVERNMENT OF GOA, DAMAN AND DIU

Office of the Chief Electoral Officer

Notification

ELN/PTN/1/68

The following notification No. 82/Goa/67 dated 6th December 1967, issued by the Election Commission of India is published for general information.

R. L. Segel, Chief Electoral Officer and Law Secretary.

Panaji, 10th January, 1967.

20 Pausa Saka 1889.

Election Commission, India

Notification

82/Goa/1/67

New Delhi-1, dated the 6th December, 1967

In pursuance of section 106 of the Representation of the People Act, 1951, the Election Commission hereby publishes the order pronounced on the 22nd November, 1967, by the Judicial Commissioner's Court of Goa, Daman and Diu, in Election Petition No. 1 of 1967.

By order,

K. S. RAJAGOPALAN
Secretary to the Election Commission.

JUDICIAL COMMISSIONER'S COURT
OF GOA, DAMAN & DIU

In the matter of Election petition no. 1 of 1967

Madhav Upendra Talaulicar — Petitioner

Vs.

1. Yashwant Sitaram Dessai.
2. Pandurang Jagannath Mulgaonkar.
3. Sharad Ranu Keni.
4. Hari P. Curchorcar.
5. Vishwanath Narayan Lawande.
6. Lekharaj Nathurmal.
7. Vithal Bablo Naik.
8. Chandrakant Roulu Naik.
9. A. Bemvinda Dias.
10. B. F. Bhandari, Returning Officer, Panjim Assembly Constituency.

— Respondents.

S/Shri M. D. Gaitonde and G. D. Kamat for the petitioner. Shri S. K. Kakodkar for Respondent No. 1. Shri U. B. Surlikar for Respondent No. 10.

November, 22nd, 1967.

JUDGMENT

In the general elections to the legislative assembly for the Union Territory of Goa, Daman and Diu held on 28th of March 1967 the respondent No. 1 Shri Yeshwant Sitaram Dessai of this election petition was declared elected from the Panjim Constituency. The other candidates from that constituency were the election — petitioner Shri M. S. Talaulicar and respondents nos. 2 to 9. The respondent no. 10 Shri B. F. Bhandari was the Returning Officer for that constituency. The petitioner polled 3776 votes which were closest to 3846 votes polled by the successful candidate, the margin being of only 70. Shri M. S. Talaulicar filed the instant petition with the prayers that the election of respondent no. 1 be declared to be void, that instead he be declared as having been duly elected to the Legislative Assembly, and that in the alternative this Court should direct a recount of the votes polled at the election and declare the petitioner duly elected if on recount he is proved to have polled a majority

of the votes cast. The prayer that election of respondent no. 1 was void was founded on the allegations that the electoral registers had not been prepared in compliance with the provisions of the law, that petitions made to the Electoral Registration Officer for amending the rolls were rejected on untenable grounds, and that the Returning Officer (respondent no. 10) had illegally rejected two applications made by the petitioner, one for recount of votes and the other for recount of the bundles prepared on counting of the votes. In rejecting those two applications, it was said further, the Returning Officer had violated the statutory provisions enshrined in Rule 63 of the Conduct of Elections Rules 1961, hereinafter called the Rules.

2. The election petition was opposed by respondent no. 1 who pleaded that respondent no. 10 had been improperly impleaded as a party, that the person who had signed the petition as M. S. Talaulicar was neither a candidate nor a voter for the Panjim constituency and so he is incompetent to challenge the election of respondent no. 1, that the election petition and the annexures thereto had not been verified in the manner required by law, and that his election is not liable to challenge on the grounds set out in the petition.

3. Respondent no. 10 alleged in his written statement that the electoral rolls had been prepared in terms of the prescribed rules and the provisions of the relevant law and that he had rejected the applications of the petitioner for recounting of the votes and the bundles because there was no justification for making such a prayer.

4. On the basis of the pleadings set out above the following preliminary issues were formulated: —

1. Whether respondent no. 10 is a necessary or proper party to the election petition? O. P. on the petitioner.
2. Whether the signatory of the election petition was a candidate or an elector in the general Assembly elections held in March 1967? O. P. On Petitioner.
3. Whether the election petition and the annexures have been verified in the manner required by law? O. P. on the petitioner.
4. If issue no. 3 is not proved then to what effect? O. P. on respondent no. 1.
5. Whether the election of respondent no. 1 to the local Legislative Assembly can be challenged on the grounds pleaded in the petition? O. P. on petitioner.

ISSUE No. 1

5. This issue was framed on the basis of objection raised by respondent no. 1 in his written statement. Shri Kakodkar, representing respondent no. 1, said at the bar, during the course of arguments, that he would not press the objection. He also happened to state that respondent no. 10 is a proper party to the petition in the context of the prayer made by Shri Talaulicar that after declaring the election of respondent no. 1 as void he (Shri Talaulicar) should instead be declared as duly elected. As such I decide the issue in the affirmative by holding respondent no. 10 as proper party to the petition.

ISSUE No. 2

6. We have the sworn testimony of Shri Talaulicar that he is the signatory of the election petition, that he was enrolled as a voter for the Assembly, and that he had filed his nomination paper as a candidate for the Panjim Constituency. Nothing could be elicited from Shri Talaulicar during cross-examination to suggest that either he is not the election-petitioner or that he had not signed the election petition or that he was not an elector or a candidate for the Panjim Constituency. Therefore, the petitioner has succeeded in establishing all the ingredients of the issue.

7. Shri Talaulicar affirmed that his full name is «Madhav Upendra Shenvi Talaulicar», that he is also known as «M. S. Talaulicar», «Madhav Talaulicar» and «Ramnath Talaulicar» in public and private life. The whole trouble appears to have arisen out of the facts that in the election petition the petitioner's name is mentioned as «Madhav Upendra Talaulicar» but he made his signature thereon which reads «M. S. Talaulicar». It is not the requirement of law that a party to a court proceeding cannot sign his name in the mode his fancy or humour dictates. There is nothing illegal or even irregular, I believe, in the petitioner signing his name as «M. S. Talaulicar» though his full name is «Madhav Upendra Shenvi Talaulicar». Hence the objection raised by respondent no. 1 leading to the formulation of issue no. 2 lacks content and substance.

ISSUE No. 3

8. The mode for the verification of an election petition and its annexures is provided in clause (c) of Section 83(1) and sub-section (2) of Section 83 of the Representation of People Act, 1951, hereinafter called the Act of 1951. It is mentioned in the relevant provisions that the petition and the annexures shall be verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings. Order VI, Rule 15, of the Civil Procedure Code enjoins that (i) every pleading shall be verified at the foot by the party concerned, (ii) that the person verifying shall specify, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon information received and believed to be true, and (iii) that the verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. The requirements nos. (i) and (iii), it was admitted by Shri Kakodkar, are satisfied in the present case. His objection was that in the language employed for verification reference was not made to paras of the petition and as such the verification is defective in reference to point (ii). The verification done on the petition reads as under: —

> «I, Madhav Upendra Talaulicar, the Petitioner above-named residing at Dada Vaidya Road, Panjim-Goa, solemnly declare that what is stated in the foregoing paras of the Petition is true to my own knowledge».

It is correct that no reference is made in this verification to the numbered paras of the petition. However, the necessity for making reference to the paras would arise only when some paras have to be verified on the basis of personal knowledge and others upon information received and believed to be true. The petitioner had verified the whole body of the petition with reference to his own knowledge. The law does not prohibit that form of verification. If the verification is found to be false on the basis of the knowledge of the party verifying the pleading, then that party may be laible to certain criminal penalties but that does not amount to saying that the verification itself can be branded as not done in accordance with the provisions of Law. I would, therefore, hold that the verification is proper both in regard to the petition as well as the annexures.

ISSUE No. 4

9. In view of my finding on Issue no. 3, this issue does not arise. The only consequence of adverse finding on issue no. 3 would have been the necessity for amendment and not that the petition should be thrown out, vide the observation of the Supreme Court in the case of Bhikaji Keshav Joshi vs. Brijlal Nandlal, A. I. R. 1955 S. C. 610.

ISSUE No. 5

10. This, in fact, is the major issue that arises for determination between the parties. The grounds on which election can be declared void are outlined in sub-section (1) of Section 100 of the Act of 1951. That sub-section reads as under: —

> «(1) Subject to the provisions of sub-section (2) if the Tribunal is of opinion —
>
> (*a*) that the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act; or
>
> (*b*) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or
>
> (*c*) that any nomination has been improperly rejected; or
>
> (*d*) that the result of the election, in so far as it concerns a returned candidate, has been materially affected
>
> (i) by the improper acceptance of any nomination, or
>
> (ii) by any corrupt practice committed in the interests of the returned candidate 1 [by an agent other than his election agent] or
>
> (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
>
> (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,
>
> the Tribunal shall declare the election of the returned candidate to be void».

Shri Gaitonde, the learned counsel for the petitioner, contended that the petitioner's case is covered by sub-clauses (iii) and (iv) of Clause (*d*) of Section 100(1). Shri Kakodkar, representing respondent no. 1, and Shri Surlikar on behalf of respondent no. 10 vehemently urged that the pleadings adopted by Shri Talaulicar do not fall within the ambit of provisions relied upon by Shri Gaitonde. The pleadings adopted by the petitioner are set out in paras 5 and 7 of the petition. (Note: There is no para in the petition bearing no. 6). In the opening part of para no. 5 it is stated that the election of respondent no. 1 is void because of the improper reception, refusal or rejection of votes, because of the non-compliance with the provisions of the Representation of People Act, of 1950, hereinafter called the Act of 1950 the Act of 1951 and the Rules made thereunder. In the subsequent part of the para the particulars of the averments just stated are outlined. It is said that the electoral register had not been prepared and revised just before the elections as required by Section 21 of the Act of 1950, and that the draft of the electoral rolls had not been published as required by Rule 10 of the Registration of Electoral Rules, 1960, hereinafter called the Electoral Rules, and that the non-publication of the draft had deprived a large number of eligible voters to enlist themselves and other persons to object to the inclusion of certain names in the electoral rolls. It is furher mentioned that under Section 23(3) of the Act of 1950 the Electoral Registration Officer was bound to amend the electoral rolls until the last date for nominations, which was 3rd of March, 1967, that the Electoral Registration Officer happened to take the stand that he would not entertain any such claim made after 20th of January 1967, and that this attitude of the Electoral Registration Officer deprived the petitioner and the political party, Maharashtrawadi Gomantak Party, of which he was the nominee in the elections of a chance to bring some eligible voters on the rolls. For the reason of these irregularities and illegalities, it is further stated in para 5, the election result had been materially affected.

11. In para 7 of the petition the grievance voiced was that the Returning Officer had improperly rejected not only the application of the petitioner for recount of the votes, but also the application for recount of the candidate — wise bundles made of the votes cast. It is alleged in para 7 that there was marked chaos and confusion in the counting hall, that at one stage disorder inside the hall reached a pitch where Shri D. K. Das, the Returning Officer for the Parliamentary Constituency, had to personally intervene and bodily remove certain persons out of the hall, and that in consequence of such confusion, chaos and disorder the petitioner apprenhended that there *might have been* some mistake in the counting. It is also stated that the two applications aforementioned were neither frivolous nor unreasonable that it was the statutory obligation of the Returning Officer under Rule 63 of the Rules to order the recount, and that this having not been done the result of the election has been materially affected warranting an order setting aside the election of respondent no. 1 and instead declaring him (the petitioner) as the duly elected member of the Assembly.

12. Put in few words, the election petition is founded on the allegations that the electoral rolls had not been prepared in terms of the law and rules governing their preparation and that some mistake might have been committed in counting the votes. Section 100(1) of the Act of 1951 reproduced above does not mention any irregularity or illegality in the matter of preparation of electoral rolls as constituting a ground for declaring the election of the returned candidate to be void. Shri Gaitonde was unable to invite my attention to any provision of law or rules, any judicial pronouncement, or any principle on the basis of which the election can be challenged on the footing of an alleged irregularity or illegality in preparing the electoral rolls. Hence the first of the two grounds set out in the petition for declaring the election of respondent no. 1 as void is not legally available for the purpose.

13. The allegations in respect of the second ground, namely, some mistake in the counting of votes or bundles, have been couched in such a vague and nebulous manner that a Court of law can safely ignore to take note of the same. It can bear repetition to state that in para 7 of the petition it is alleged that the petitioner «apprehended that there might have been some mistake in the counting». Speaking legally, this assertion in the petition does not amount to a definite pleading. Hence I agree with S/Shri Kakodkar and Surlikar that factually speaking, the petition does not disclose any cause of action.

14. The assertion by the petitioner's counsel that there had been some mistake in counting the votes and the bundles must inevitably lead to the prayer that the recounting of the ballot papers and the bundles should be done in this Court. The law on the subject of inspection of the votes cast and their recounting has been precisely enunciated in the judicial pronouncements of the various High Courts in India and of the Supreme Court. It was held in the case of N. Pethu Reddiar vs. V. A. Muthiah, A.I.R. 1963 Madras 390, that where there is no proof, not even suspicion, of any irregularity at the counting of votes, there is no justification for directing a recount of votes and that an election petitioner cannot claim a recount only because in his petition he has prayed that on a proper counting of votes he would be the person to secure a majority of lawfulvotes. A Tribunal can direct a recount the High Court observed further only in cases which are substantiated by specific instances and reliable prima facie evidence. The Madras High Court reproduced with approval the following passage from Hammond's Election Cases, 1920 — 1935, page 307: —

> «It is well settled that no candidate is as a matter of right entitled to such recount or scrutiny merely for the asking .....
>
> It is a matter of discretion for the Court, and the petitioner has to make out and prove specific grounds which would satisfy the Court that the return was not accurate and that recount and scrutiny are called for in the interests of justice».

At page 671 of Hammond's work it is said that where an application for recount of votes rested on nebulous allegations about the counting of batches of votes twice over, that was not a prima facie case established to warrant the directing of a recount and that recount would only be granted in the cases which are substantiated by specific instances and reliable prima facie evidence. If the law were otherwise it will indeed lead to considerable inconvenience. A defeated candidate in an unexceptionable election might harass the successful candidate by filing a frivolous petition and asking for a recount, involving thereby a repetition of the process of counting with no manifest advantage to anybody concerned.

15. In the case of Tribeni Ram vs. Satyadeo Singh, A.I.R. 1966 Allahabad 20, a Division Bench held that a mere assertion or an expression of a suspicion by a petitioner that there has been a mistake in counting votes will not justify a recount or an inspection of ballot papers which a recount necessarily presupposes. The closeness of the voting or a narrow majority of votes does not in itself justify a recount. There must be prima facie evidence of good grounds for believing that there may have been a miscount on the part of the Returning Officer. The facts of Allahabad case were much stronger than of the case in hand. There one mistake had been detected during sorting of votes but nothing of the kind is alleged to have happened in our case. Despite that mistake the High Court held that where the candidates and their agents had closely watched the whole process of counting and the Returning Officer had carefully supervised it, one single mistake detected in the sorting of votes and rectified before the finalisation of Form No. 20 cannot be regarded as having robbed the counting of the presumption of correctness and to have by itself rendered an inspection of ballot papers and a recount imperativev or expedient.

16. Finally, I may refer to the observations made by the Supreme Court in the case of Ram Sewak vs. H. K. Kidwai, A.I.R. 1964 S. C. 1249: The following excerpt from the judgment is revealing on the right of an election petitioner for inspection of the ballot papers and claim for recount: —

> «An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled:
>
> (i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and
> (ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for ins-

pection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection».

When the allegations made by Shri Talaulicar in his petition are examined in the light of principles set out above, I feel satisfied that no case has been made out for directing recount of the votes. If recount cannot be claimed by the petitioner or ordered by the Court, to proceed further with the petition would be a sheer exercise in futility, a pastime in which the Courts of the country of the stature of India cannot afford to indulge.

17. Shri Gaitonde criticised the orders made by the Returning Officer on the two applications made by Shri Talaulicar for recounting of the votes and recounting of the bundles. It was urged that in terms of sub-rule (3) of Rule 63 of the Election Rules it was the bounden duty of the Returning Officer to accept the prayer for recounting of the votes and the bundles.

I have found this submission to be devoid of force. In order to comprehend the exact powers of the Returning Office while disposing of application for recounting of the votes it looks necessary to reproduce the first four sub-rules of Rule 63. They run as under:

«(1) After the completion of the counting, the returningg officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same.

(2) After such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the Returning Officer to recount the vote either wholly or in part stating the grounds on which he demands the recount.

(3) On such an application being made the Returning Officer shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appeared to him to be frivolous or unreasonable.

(4) Every decision of the returning officer under sub-rule (3) shall be in writing and contain the reason therefor».

The wording of sub-rule (3) clearly arms the Returning Officer with the discretion to accept or reject the application for recount. The only obligation he is placed under is that his decision shall be in writing and it shall contain reasons therefor. It is not denied that the Returning Officer had made the two order in writing and he had given reasons in support thereof. I agree that the discretion when applied to a Court of Justice means a sound discretion guided by law and that the discretion must be governed by rule and not humour. In other words, the discretion must not be arbitrary, vague or fanciful. Instead it should be legal and regular. It was observed in the case of Tribeni Ram (Supra) that where the Tribunal considered the facts and circumstances of the case and applied the correct principle as to when an election Tribunal should direct a recount and came to the conclusion that the allegations of the appellant regarding improper reception and rejection of the votes remained altogether unsubstantiated and as such there was nothing to satisfy the Tribunal prima facie that a recount was necessary, neither the appellant was entitled to a recount nor was a recount expedient in the interests of justice. This principle affords sufficient guidance for determining the validity or otherwise of the order made by the Returning Officer, Respondent no. 10, on the two applications filed by Shri Talaulicar. The applications and the orders passed thereon have been marked Exh. P-3 and P-4. The application for recounting of votes was rejected on the score that Shri Talaulicar had not alleged in his application (Exh. P-3) that the counting assistants or counting supervisors had been guilty of committing mistakes, and that the allegation that the counting agents of the petitioner could not properly concentrate on the work of counting due to chaos and confusion in the counting hall would not justify recounting of the votes. The other application Exh. P-4-for recounting of the bundles was rejected on the grounds that the result of all the counting at each table was supervised by the counting agents of all the candidates and that no counting agent had complained that there had been any mistake in bundling of the votes. I believe that the reasons given by the Returning Officer in reference to both the applications were adequate. That conclusion is buttressed by the fact that in the election petition itself no allegation has been made that any mistake had been committed in counting the votes or the bundles. Consequently, the criticism levelled by Shri Gaitonde against the Returning Officer is altogether unfounded. I remain unconvinced that the Returning Officer had violated any of the rules made under the Act of 1951. The undoubted discretion vesting in him for disposal of the two applications made by Shri Talaulikar had been fairly exercised by him. The allegations made in the two applications were altogether vague and indefinite. They were certainly not of a variety which would weight with the Returning Officer to order the recount. Shri Gaitonde has failed to satisfy me that the Returning Officer had not complied with the provisions of clauses (iii) and (iv) of S. 100 of the Act of 1951. Hence issue no. 5 is decided against the petitioner.

18. As a result the petition fails and is dismissed. In the matter of costs the petitioner is entitled to some consideration because the petition has been dismissed almost at the preliminary stage. I think ends of justice would be met if the petitioner is directed to pay half the costs to the contesting respondents nos. 1 and 10. I order accordingly. Advocates' fee shall be assessed at Rs. 75/- for the hearing on 21-11-67 and at Rs. 20/- in regard to other hearings.

Announced in open Court.

R. S. BINDRA

Additional Judicial Commissioner
Goa, Daman & Diu, Panjim

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